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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN A. KNOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.

II. Where no other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, and the defendant knew that the videotape contained no nudity and was told that the videotape was therefore legal, did the government introduce sufficient proof of *scienter* to support a guilty verdict?

III. Where no other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, is an objectively reasonable good faith belief in the legality of the depiction a valid affirmative defense?

IV. Assuming *arguendo* that there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by clothing, is 18 U.S.C. § 2256(2)(E) unconstitutionally vague and overbroad?

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In the Supreme Court of the United States

--- Term, 1992

No.

STEPHEN A. KNOX, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported in *United States v. Knox*, 977 F.2d 815 (3d Cir. 1992) and is reproduced in the Appendix to this petition. PA 1-25.[1] The opinion of the district court denying Knox's pretrial motion is reported at 776 F. Supp. 174 (M.D. Penn. 1991).

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[1]"PA" is Appendix to this Petition for Certiorari. (A is a citation to the Appendix filed in the Third Circuit.)

JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment on October 15, 1992, affirming petitioner Stephen A. Knox's conviction for receipt and possession of child pornography as proscribed by 18 U.S.C. § 2252 *et seq.* This petition for a writ of certiorari was filed within ninety (90) days of judgment by the Third Circuit. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, § 2252(a)(2)[2] and (a)(4)(B) provide in pertinent part:

> (a) Any person who --
>
> (2) knowingly receives ... any visual depiction that has been mailed ... in interstate or foreign commerce, or which contains materials which have been mailed ... if --
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
>
> (4) either --
>
> (B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed ... in interstate or foreign commerce, or which was produced using materials which have been mailed ... if --
>
> (i) the producing of such visual depiction involves the use of a minor engaging in sexually

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[2]This statute was recently held to be unconstitutional on its face *United States v. Gottesman*, ___ F.2d ___, 1992 WL 367097 (9th Cir. decided December 16, 1992).

explicit conduct; and

(ii) such visual depiction is of such conduct:

shall be punished as provided in subsection (b) of this section.

Title 18, United States Code, § 2256(2) provides in pertinent part:

For the purposes of this chapter, the term --

(2) "sexually explicit conduct" means actual or simulated --

(A) sexual intercourse ...;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Stephen A. Knox was convicted on one count of receiving depictions of minors engaged in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(2) and § 2256(2)(E) and one count of possessing three or more items containing a depiction of minors engaged in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(4)(B) and § 2256(2)(E), based solely on three videotapes containing videotaped sequences sold by a Nevada-based company, Nather, Inc. ("Nather").

Although none of the minors depicted in the videotapes were shown to be engaged in any actual or simulated sexual conduct and all genitals were fully covered, the district court agreed to decide -- and then denied -- a pretrial motion to dismiss based upon the contents of the

videotapes. The underpinning of the district court's denial was a finding that the uppermost portion of the inner thigh was the "pubic area". Since the pubic area was exposed (nude), the district court reasoned, a prosecution based on an exhibition of the pubic area -- not the genitals -- was statutorily authorized:

> Although in every instance the girl's genitals were covered by either underpants or a bathing suit, the area in close proximity to the genitals, specifically the uppermost portion of the inner thigh area closest to the girl's genitals, were clearly exposed.

United States v. Knox, *supra*, 776 F. Supp. at 180.

At a subsequent bench trial, the trial judge found that the "exhibitions" were "lascivious" and had been received by Knox in the mails. Knox was convicted and, on February 13, 1992, sentenced to the mandatory minimum sentence of five (5) years imprisonment.

On October 15, 1992, the Third Circuit found the district court in error because "[d]isplaying any portion of the inner thighs does not constitute an exhibition of the pubic area under 18 U.S.C. § 2256(2)(E)." *United States v. Knox*, *supra*, 977 F.2d at 819-820. (PA 9). However, the Third Circuit affirmed Knox's conviction, holding that displaying *fully covered* genitals *does* constitute an "exhibition" under 18 U.S.C. § 2256(2)(E).

B. Statement of Facts

1. The Defendant

Petitioner Stephen A. Knox is an honors graduate student working on his doctorate in history at Pennsylvania State University, where he has maintained a 4.0

average since his admission in the Fall of 1990. (A 81). He graduated summa cum laude in 1986 with a bachelors degree from Temple University. (A 80). Knox was described by his graduate adviser, Dr. Nan Elizabeth Woodruff, as a serious student who has, throughout his case, maintained the rigorous work load required of him. Dr. Woodruff attested to the fact that Knox "easily ranks among [the] top five graduate students" at Penn State. (A 82). Similarly, Professor William A. Blair found Knox to have "enriched the graduate community at Penn State" and to have taken substantial initiative in gaining a mastery of his subject matter. Professor Blair also noted Knox's high motivation to achieve success in his chosen profession as an historian and the equally high likelihood that he will do so. (A 83).

Although Knox was previously convicted for receiving "child pornography" sold to him by a government sting operation, he has carefully and faithfully obeyed the terms of his probation, which has included attending therapy sessions on a regular basis. Relying heavily on the psychological evaluation of Dr. Fred Covan, Chief Psychologist at Bellevue Hospital in New York (A 84 to 88), the trial judge concluded that there is "*absolutely no evidence of any inclination by the defendant of untoward conduct toward anyone else*" and granted Knox bail pending appeal. (Emphasis added.) (ST 28 to 29)[3]

2. The Pretrial Motion

The district court granted a pretrial hearing on the issue

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[3]Three transcripts comprise the entire record in this case. Testimony and argument on the motions on August 28, 1991, are contained in the motion transcript, or "MT". The November 14, 1991, trial has the usual designation of "T". Sentencing and argument on the post-trial motions on February 13, 1992, are contained in the sentencing transcript, or "ST".

of whether the three videotapes could be found to depict minors engaging in "sexually explicit conduct" under the statute where the minors' genitals were completely covered by clothing. Because the defendant waived his right to a jury trial, the Court agreed to rule upon an issue usually reserved for trial. *Knox, supra*, 776 F. Supp. at 178-179. The trial court observed that "[t]his is a case of first impression." *Id.* at 180. The government conceded at the hearing (MT 66 to 69) and has conceded throughout this litigation that this is the very first prosecution based upon an exhibition of the genitals or pubic area covered by clothing. It is undisputed that nude genitals are never depicted in the three videotapes.

The trial judge acknowledged that the government's theory at trial rested upon an exhibition of the pubic area, rather than the genitals. In denying Knox's pretrial motion, the judge adopted a scientifically incorrect view that the uppermost portion of the inner thigh was part of the "pubic area" and -- since the inner thigh was exposed (nude) -- found that the three tapes contained an "exhibition" under § 2256(2)(E). The court left for trial its determination of whether that exhibition was "lascivious". *Id.* at 180.

3. The Bench Trial

At the bench trial on November 14, 1991, all of the testimony and exhibits on the motions to suppress and dismiss were incorporated for purposes of the trial. (T 3). The government introduced advertisements and a catalog for videotapes from Nather, Inc., with an address in Las Vegas, Nevada. The government offered envelopes, found at Knox's apartment, which bore Nather, Inc.'s address. These envelopes were printed and provided by Nather, Inc. to be used in ordering material. A $62 Traveller Express money order to Nather, Inc., dated June

4, 1990, (twenty-two (22) months prior to the date the indictment alleged the crime was committed) was also introduced. (T 6 to 7).

The government's sole witness, a Customs agent, testified that Knox had rented a mail box at Mail Box Etc. under the name of J. Richard Scott, several months *after* the money order to Nather was written. (T 7 to 9). On cross-examination, the agent acknowledged the possibility that the videotapes seized from Knox's apartment were "dubs", i.e. not the original tapes made and distributed by Nather. (T 11). The agent also acknowledged that he had no evidence that any materials were ever received by the defendant at the mail box. (T 12).

The defense offered into evidence various issues of *Video Magazine*, which contained Nather advertisements (T 15 to 16). The government offered copies of Nather brochures, seized from Knox's apartment, which proclaimed that the tapes were legal and contained no nudity or sexually explicit conduct. (MT 51). The defense argued in summation that the government had failed to prove the element of mailing, the necessary *mens rea*, and adopted the other arguments previously made at the pretrial motion. (T 17 to 20).

4. The Verdict

The court filed a written pleading on November 15, 1991, finding the defendant guilty on each count (without reasons), ordered a pre-sentence investigation, and set sentencing for February 13, 1992, at 1:00 p.m.

5. Post-Trial Motion

Prior to sentencing, Knox filed a motion for verdict of acquittal or, in the alternative, for a hearing to explore

further "the relationship of the medical and anatomical authorities to the intent of Congress" (A 51 to 55). The motion was supported by an affidavit of Dr. Todd Olson, Director of Human Gross Anatomy at the Albert Einstein College of Medicine, establishing the indisputable fact that the uppermost portion of the inner thigh is not the pubic area.

The trial judge denied the motion (A 58 to 60), and sentenced Stephen Knox to the minimum mandatory five (5) year term. (ST 22 to 24).

REASONS FOR GRANTING THE PETITION

Petitioner Stephen A. Knox was convicted for receipt and possession of three videotapes which contain depictions of a type which no court anywhere (either state or federal) has ever found criminal since the first federal child pornography laws took effect on February 1, 1978, fourteen years ago. The government has conceded that this is the first prosecution where it has been alleged or argued that genitalia that are completely covered by clothing can still be "exhibited".

Knox's petition raises substantial issues of a constitutional dimension. The Third Circuit's expansive interpretation of 18 U.S.C. § 2256(2)(E)'s term "exhibition" to include images of minors whose genitals and pubic areas are fully covered by clothing (and who are otherwise engaged in no sexually explicit conduct) avoids the plain meaning of the statute, violates the Rule of Lenity, distorts the legislative history, and creates a vague and overbroad interpretation of that criminal statute.

Given the substantial First Amendment rights at stake, the serious penalties faced by defendants convicted for "child pornography crimes", the enormous social stigma

attached to those even accused of the crime, and the widespread chilling effect on protected First Amendment conduct, such an overbroad reading of the child pornography statute cannot constitutionally stand.

The Third Circuit's expansion of the child pornography laws will have a chilling effect upon legitimate publishers and contravenes the limitations on such laws set forth in the *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Worse, the government will have an unlimited charging power. Depictions of minors in bathing suits, leotards, shorts, underwear, and other similar clothing are created every day and may be found everywhere throughout society. The Third Circuit's decision places such depictions into a "grey area" where a decision to prosecute may rest on the government's subjective view of the potential defendant, and is limited only by a "far from crystal clear" requirement of "lasciviousness". *United States v. Knox, supra*, 977 F.2d at 823 fn. 5. (PA 19).

The Third Circuit has misread the legislative history of the federal statute to find a Congressional intent to proscribe depictions of minors whose genitals and pubic areas are not exposed. In doing so, the Third Circuit has ignored the Rule of Lenity applicable to criminal statutes, and substituted its judgment for that of Congress. The result is to convict Knox of conduct neither he nor anyone else could possibly have known was criminal.

In finding Knox guilty of "knowingly" receiving and possessing "child pornography", the Third Circuit has held Knox to a standard of *scienter* which is inappiicable to the facts of his case and in conflict with analogous decisions of the Court of Appeals in *United States v. Gottesman*, _ _ F.2d ___, 1992 WL 367097 (9th Cir. decided December 16, 1992), and *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989).

A. There can be no "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.

18 U.S.C. § 2256(2)(E) (1988) defines "sexually explicit conduct" to include a "lascivious exhibition of the genitals or pubic area of any person". It is not open to dispute that the videotapes in *Knox* did not depict either sexually explicit conduct as defined in 18 U.S.C. § 2256(2)(A) through (D) or even partial nudity of the genitals or pubic area. Moreover, as both the district court and Third Circuit decisions emphasized, in every instance the girls depicted in the videotapes were fully clothed.

1. The "Plain Meaning" of the Statute

Clearly, if the word "exhibition" has any meaning at all, it is that the object being "exhibited" actually be seen. "Exhibition" means "an exhibiting, showing or presenting to view," and "exhibit" means "to offer or *expose to view*; present for inspection". (Emphasis added). *Random House Dictionary of the English Language* (Unabridged), 1979. "Expose" means "to uncover or bare to the air, cold, etc.; to present to view, exhibit, display," and "view" means "to see, behold". *id.* The sole antonym listed in the *Random House Dictionary* for "exhibit" is "conceal," a word which means "to *cover* or keep from sight." *id.* (Emphasis added). Thus, the Third Circuit's statement that § 2256(2)(E) criminalizes "exhibitions" of the genitals or public areas "even when these areas are *covered* by an article of clothing," is literally a contradiction in terms. *United States v. Knox*, *supra*, 977 F.2d at 825 (PA 24) (emphasis added). Simply put, to exhibit something requires that the thing exhibited actually be seen -- that is, *not* covered, but exposed to view.

The Third Circuit could therefore not have been more inaccurate when it stated that "[a]pplying the plain meaning of the word "exhibition" leads to the conclusion that nudity is not a prerequisite for the occurrence of an exhibition." *Id.* at 820. (PA 11). The plain meaning of the proscription under 18 U.S.C. § 2256(2)(E) requires that the genitals or pubic area be exhibited -- not covered -- in the depiction in question. One does not attend an "exhibition" of sculpture or painting and expect to see the artwork covered. Common sense dictates that the artwork will be capable of being seen -- i.e., exposed to public view. Likewise, there can be no "exhibition of the genitals or pubic area" where these parts of the body are covered by clothing.[4]

2. The Legislative History

The Third Circuit's truncated reading of the legislative history of the child pornography law led it to conclude:

> Congress appears to have repudiated its earlier intention to confine the statute's coverage to nude exhibitions. Further, Congress failed to articulate anywhere in its extensive legislative history any desire that the statute, as enacted, prohibit only nude portrayals.

Id. at 821. (PA 12-13).

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[4]The Third Circuit's use of phrases such as "nude exhibition", "nude portrayal," and "clothed and unclothed images of a child's genitalia" highlights both a semantic and a logical problem with the Third Circuit's decision. It is not exhibitions, portrayals, or images which are clothed or nude, but genitals themselves. Moreover, the statute specifies that it is *genitals* that cannot be shown. Since "clothed genitals" are not genitals themselves, depictions of "clothed" genitals cannot fall under the statute's proscription.

However, the legislative history of 18 U.S.C. § 2252 *et seq.* makes absolutely clear Congress' intent to criminalize only depictions of children whose genitals or pubic areas were *nude* and who were engaged in exhibiting their genitals or pubic areas in a "lewd" (now "lascivious") manner.

The original legislative proposal introduced by Senator Roth in 1977, S. 1011 (the "Roth" bill), would have criminalized "nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." That provision was roundly criticized by lawyers who testified before Congress, as well by the Justice Department. A letter dated June 14, 1977, from Assistant Attorney General Patricia Wald to Senator Eastland, then-Chairman of the Committee on the Judiciary, specifically recommended that

> The term "nudity ... depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction" is also troublesome. This definition differs from the "average person" text for obscene material set forth in *Miller v. California*, *supra*, and it would be difficult to determine by what standard the "sexual stimulation or gratification" could be assessed. We would suggest as an alternative definition "lewd exhibitions of the genitals," a phrase used by the Chief Justice in *Miller v. California*, *supra*, to described one of a variety of types of conduct which could be prohibited under state obscenity statutes. Congress could make clear in the legislative history of the bill *what types of nude portrayals of children* were intended to be encompassed within this definition.

(Emphasis added.) *Protection of Children Against Sexual Exploitation*, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the

Judiciary, United States Senate, 95th Congress, First Session, May 27, June 16, 1977, pp. 77-78.

The Justice Department recommendation to narrow the proposed ban on nudity was adopted by Senators Mathias and Culver in drafting S.1585 (the "Mathias-Culver" bill). The difference between the Roth and Mathias-Culver bills was the subject of University of Pennsylvania Professor Paul Bender's extensive testimony before Congress. Professor Bender, also former general counsel to the President's Commission on Obscenity and Pornography (1970), testified why the Mathias-Culver bill was preferable to the Roth bill vis-a-vis 18 U.S.C. § 2256(2)(E):

> Most importantly, is the definitional section of the Roth bill. It uses the conduct which it prohibits as having children engage in prohibited sexual acts and then it defines the prohibited sexual acts in a number of ways. Most of these definitions are okay. But some of them strike me as vague and so vague as to perhaps be unconstitutional. ... The nudity provision is a little bit troublesome also. It says, "nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." I have a problem with that in knowing whose purpose they are talking about and when that has to be the purpose. Is the notion of this that the person taking the picture has to take the picture for the purpose of stimulating or gratifying someone else sexually, or is it enough if the picture is simply used that way for that purpose by somebody later, even if that was not the purpose of the person who took the picture?
>
> Nudity generally, I think, may be a bit overbroad in terms of the purposes of the legislation. I would not want to classify as child abuse anyone who takes

> a picture of a child without any clothes on. Lots of people do that of their children. They send it to the child's grandparents in interstate commerce. I don't think you would want to cover that. *So I think it's right to qualify "nudity." But this qualification [in the Roth bill] strikes me as vague."*

(Emphasis added.) *Protection of Children Against Sexual Exploitation*, Hearings, *supra*, p. 103.

In other words, Professor Bender understood the phrase "lewd exhibition of the genitals," contained in the Mathias-Culver bill, as a qualification -- and a narrowing -- of the broader term "nudity". It was, *in fact*, a qualification and narrowing, because by limiting to the scope of the proscription on nudity to "lewd exhibition of the genitals or pubic area," Senators Mathias and Culver ruled out other types of nude portrayals, e.g. nudity of the breasts or buttocks. The first child pornography law, The Protection of Children Against Sexual Exploitation Act of 1977, adopted the Mathias-Culver language and limited the law's application only to those depictions which contained a "lewd exhibition of the genitals or pubic area" within the context of "sexually explicit conduct". Congress has never acted to expand that proscription.

As used in the statute, the phrase "lewd exhibition of the genitals" has a common sense meaning: it refers to a type of sexual conduct on the part of the model depicted which is designed to exhibit and draw attention to his or her genitals. Such was the understanding of members of Congress and witnesses who appeared before it in hearings in 1982, when Congress was considering amending the child pornography statute in light of *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), to remove the requirement that depictions of minors engaged in "sexually explicit conduct" be obscene

in order to be proscribed. Senator Specter, mindful of the problems of constitutional overbreadth which might be posed by an outright ban on non-obscene depictions of "lewd exhibition[s] of the genitals or pubic area," proposed that such exhibitions continue to be protected if they possess literary, artistic, or scientific merit.

In discussing this proposal, Bruce Rich, on behalf of the Association of American Publishers, suggested that the exception should apply to the entire range of "sexually explicit conduct," not merely to "lewd exhibitions of the genitals." Mr. Rich, like the members of Congress who were considering changes in the law, correctly assumed that the phrase described a *type* of nudity:

> We say, first, that it is not enough merely to tag on the literary, etc., exception to exhibitions of nudity, as Senator Specter's own proposal would suggest .... We would suggest having the literary, artistic, etc. exemption to modify the entire range of conduct which would be otherwise prohibited.

Child Pornography, Hearing before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 97th Congress, December 10, 1982. Serial No. J-97-152, pp. 19-20.

In 1986, when Congress again contemplated amending the child pornography laws, comments by Senator Roth accurately reflect that what Congress had intended to criminalize in 1977 were *nude* depictions of a certain character. Senator Roth, speaking in support of H.R. 5560, the "Child Sexual Abuse and Pornography Act of 1986," the House counterpart to his bill, S. 2398, correctly referred to "child pornography" as "photos, films and videotapes depicting *nude* young children *engaged in explicit sexual behavior*". (Emphasis added.) *Congressional*

Record, Senate, October 18, 1986, S. 17296.

The Supreme Court has used the phrase "lewd exhibition of the genitals" to denote exhibitions where the genitals are visible, i.e., nude, and in which the subject is engaging in some sort of conduct intended to draw attention to his or her exposed genitals in a sexual manner. In *New York v. Ferber*, *supra*, 458 U.S. at 762-3, 102 S.Ct. at 3357, Justice White observed that

> It is unlikely that visual depictions of children ... *lewdly exhibiting their genitals* would often constitute an important and necessary part of the literary performance or a scientific or educational work.

In *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d (1974), where the Supreme Court held that the film "Carnal Knowledge" could not be "obscene" as a matter of constitutional law, Justice Rehnquist inquired whether the film contained hard core sexual acts or "lewd exhibitions of the genital" and found that

> [w]hile the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatsoever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standard.

418 U.S. at 161, 94 S.Ct. at 2755.

Clearly, Justice Rehnquist was talking about exhibitions of genitals where the genitals were visible, not covered by

clothing. This is the only common sense -- and plain -- meaning to be derived from the phrase.

Nowhere in the entire legislative history of the child pornography laws, as amended over a period of fourteen years, is there *any* discussion by *anybody* which would indicate that videotapes which depict fully clothed minors not otherwise engaged in sexual conduct could be criminalized. Moreover, the extensive discussions regarding "child pornography" and "sexually explicit conduct" unquestionably reflect a consensus of opinion that "lewd exhibition of the genitals" represented the type of *nudity* which Congress wished to ban.

3. Precedent

In fourteen years of zealous enforcement of the federal child pornography laws, no person other than Stephen A. Knox has been indicted or convicted for receiving or possessing depictions of minors whose genitals and pubic areas are fully covered by clothing. Nor has any person been indicted or convicted for producing such depictions. *Every* case involving allegations of "child pornography" has involved depictions of minors engaged in actual sexual conduct or whose genitals or pubic areas were nude and exposed to view. Even if it *could* be argued that the plain words of the statute proscribe depictions of minors whose genitals and pubic areas are fully covered by clothing, the fact that there have been no prosecutions other than Knox further suggests that the Third Circuit's interpretation of § 2256(2)(E) is at odds with the general understanding of that section on the part of law enforcement officials, prosecutors, and the public at large. This is especially true, where, as here, the very producer and seller of the videotapes in question carried out its business openly through nationally-prominent publications without suffering any legal repercussions.

The sole authority relied upon by the Third Circuit for its finding that "lascivious" depictions of minors whose genitals are fully covered are illegal under § 2256(2)(E) is *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986). In *Dost*, the court outlined six factors "among any others that may be relevant in the particular case" in determining whether an exhibition of the genitals or pubic area is "lascivious". *Id.*, at 832. Those factors included such considerations as where and by whom the photograph was taken, the focal point of the image, and the demeanor of the subject. The fourth *Dost* factor, "whether the child is fully or partially clothed, or nude," according to the Third Circuit, "rests on the implicit assumption that a clothed exhibition of the genitals is criminalized under the statute." *Knox*, *supra*, 977 F.2d at 823. (PA 17).

The Third Circuit's conclusion is based on a number of errors. First, depictions of clothed minors were not at issue in *Dost*. Both subjects in *Dost* were "totally nude": the first was photographed "in a variety of positions ... with her genitals and breasts fully exposed"; the second was photographed in a contorted pose so that "[h]er pubic area is completely exposed, not obscured by any shadow or body part." *United States v. Dost*, *supra*, 636 F. Supp. at 833. Second, the *Dost* court's discussion of the fourth factor made it clear that the statute requires that the genitals actually be seen, i.e., nude:

> For example, consider a photograph depicting a young girl reclining or sitting on a bed, *with a portion of her genitals exposed*. Whether this visual depiction contains a "lascivious exhibition of the genitals" will depend on other aspects of the photograph. If, for example, she is *dressed* in a sexually seductive manner, with her open legs in the foreground, the photograph would most likely constitute a lascivious exhibition of the genitals....

> On the other hand, if the girl is *wearing clothing* appropriate for her age, the visual depiction may not constitute a "lascivious exhibition" of the genitals, *despite the fact that the genitals are visible.*

(Emphasis added). *United States v. Dost*, *supra*, 636 F. Supp. at 832.

What the Third Circuit ignored in its reading of *Dost* is the fact that the *Dost* court's entire discussion was premised on the fact that the subject's genitals were exposed, visible, nude -- i.e., not fully covered by clothing.

Third, the Third Circuit used the fourth *Dost* factor as a means to determine whether there has been an *exhibition*. The *Dost* court considered it relevant only to determine whether the "exhibition" in question was "lascivious". As the Ninth Circuit observed in *United States v. Arvin*, 900 F.2d 1385, 1391 (9th Cir. 1990) the two issues are markedly different:

> In formulating an instruction defining "sexually explicit conduct" under § 2256(2)(E), the Court, of course, must instruct the jury that it must find that the pictures visually depict the minor's genitals or pubic area. This is a threshold element contained in the [statute] itself, distinct from the additional requirement that the depiction be "lascivious".

Thus, even if the *Dost* factors were appropriate to determining whether a given exhibition is "lascivious"[5], they are utterly inappropriate to determining whether an "exhibition" has occurred.

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[5]The *Dost* factors, of course, are not part of the statute and they have not been universally recognized as the definitive interpretation of it. Nor does petitioner believe they should be.

One of the photographs at issue at trial in *United States v. Villard*, 700 F. Supp. 803 (D. N.J. 1988), aff'd. 885 F.2d 117 (3d Cir. 1989), makes it clear why a court might inquire whether the subject was "fully or partially clothed, or nude" in analyzing whether an "exhibition of the genitals or pubic area" is a "lascivious" one. That photograph depicted a *fully clothed* teenage boy, whose erect penis was sticking out one of the legs of his shorts. (See *United States v. Villard*, *supra*, 700 F. Supp. at 805.) The fact that the boy was fully clothed *and* his genitals were exhibited suggests that the court in *Knox* has mistaken "clothed" for "covered". That is, a minor may, in fact, be *fully clothed*, while his or her genitals are *uncovered*, i.e., exhibited. This is easily accomplished by pushing the clothing aside or causing the genitals or pubic area to appear through an opening in the clothing. It is these depictions to which the fourth *Dost* factor might be relevant, not to depictions such as those in *Knox* where the subjects were fully *clothed* and their genitals fully *covered*.

D. The Rule of Lenity Requires Reversal of Knox's Conviction

Nothing in the statute, the legislative history, or the case law suggests that "child pornography" as defined under § 2256(2)(E), encompasses depictions of fully clothed minors in which neither the genitals nor the pubic areas are exposed to view. The Third Circuit's interpretation of this criminal statute is admittedly expansive:

> Although our interpretation of an exhibition is *expansive*, the limiting principle in the statute is the requirement of lasciviousness.

(Emphasis added). *United States v. Knox*, *supra*, 977 F.2d at 823. (PA 19).

Such an expansion of a criminal statute is impermissible and violates the Rule of Lenity, "a rule of statutory construction whose purpose is to help give authoritative meaning to the statutory language." *United States v. Thompson Center Arms Co.*, ___ U.S. ___, 112 S.Ct. 2102, 2110 fn. 10, ___ L.Ed.2d ___ (1992).

The "venerable Rule of Lenity" is "rooted in 'the distinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should.'" *United States v. Bass*, 404 U.S. 336, 347-348, 92 S.Ct. 515, 522-523, 30 L.Ed.2d 488 (1971), quoting H. Friendly, *Benchmarks*, 209 (1967). *See also*, *United States v. R.L.C.*, ___ U.S. ___, 112 S.Ct. 1329, 1338, ___ L.Ed.2d ___ (1992). The Rule of Lenity has two (2) purposes. "The main function of which, as Justice Stevens recently observed,

> is to protect citizens from the unfair application of ambiguous punitive statutes. Obviously, citizens should not be subject to punishment without fair notice that their conduct is prohibited by law.

United States v. Thompson Center Arms Co., *supra*, 112 S.Ct. at 2114 (Stevens, J. dissenting).

The Rule of Lenity requires "fair warning", in language that the common world will understand, of what the law intends to do if a certain line is crossed. *Liparota v. United States*, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985). *See also*, *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931).

The second purpose for the Rule of Lenity is to ensure that lawmakers have genuinely called for punishment to be meted out. "Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community,

legislatures and not courts should define criminal activity." *United States v. Bass*, *supra*, 404 U.S. at 348, 92 S.Ct. at 523; *Liparota v. United States*, *supra*, 471 U.S. at 427, 105 S.Ct. at 2089. The applicability of the Rule of Lenity to the interpretation of 18 U.S.C. § 2256(2)(E) is required by the government's concession that no federal prosecution has ever before claimed that genitals may be "exhibited" at the same time that they are completely covered. The lack of prosecution is certainly not explained by an absence of such depictions in our society (or that the government alone was oblivious to them). It seems beyond unfair that an individual graduate student who possessed three tapes containing such depictions can be the first and only person ever prosecuted under this interpretation of the statute.

In *United States v. R.L.C.*, *supra*, Justice Souter, for the majority, and Justice Scalia, for the dissent, tangled over whether the Rule of Lenity must be applied to a facially ambiguous statute before the court resorts to legislative history. Justice Scalia argued forcefully that the Rule of Lenity precluded using legislative history against a defendant to save a facially ambiguous statute. 112 S.Ct. at 1339-40. However, such a dispute has no application here. The legislative history and the absence of any previous enforcement join the unconstitutional overbreadth of the Third Circuit's interpretation to argue *for* the defendant and the application of the Rule of Lenity.

B. The government failed to prove Knox had the requisite *scienter* to violate the statute.

Even assuming *arguendo*, that a "lascivious exhibition of the genitals or pubic area" may include exhibitions of fully clothed minors whose genitals are completely covered, Knox lacked the requisite *scienter* to commit the crime of receiving and possessing "child pornography" because he

could not have known that such depictions ran afoul of the statute. This is more than just an excuse that he was ignorant of the law. Given the history of law enforcement in this area and the ubiquity of images of fully clothed minors whose genitals are completely covered, no person could reasonably be expected to have known that such images fell within the definition of "child pornography".

Common understanding of what laws mean encompasses not only the language of the statute itself, but also "the gloss which life has written upon it". *Nashville C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940). As Professor Bickel has noted, "[t]he average nonreader of the statute books knows of the law what he knows of ethics and customs, and for the rest, what he knows of prosecutions." Bickel, 'The Supreme Court -- Foreward,' 75 *Harvard L. Rev.* 40, 63 (1961).

The fact that every other prosecution under the statute has involved images of minors either engaged in sexual behavior or whose genitals or pubic areas were nude and exposed to view weighs heavily against the Third Circuit's finding that Knox possessed the requisite *scienter* to violate the statute. Knox's purported awareness that the videotapes contained "materials designed to sexually arouse a pedophile" (*United States v. Knox, supra*, 977 F.2d at 825 (PA 24)) is irrelevant to his guilt if no reasonable person could have known that depictions of clothed minors could run afoul of the child pornography laws. (PA 24). As the Third Circuit itself taught in *United States v. Villard, supra*, 885 F.2d at 125, "[w]hen a picture does not constitute child pornography ..., it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it." *See also, Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1344-45 (N.D. Texas 1985), affirmed *sub nom. Faloona by Frederickson v. Hustler*

Magazine, Inc., 799 F.2d 1000 (5th Cir. 1986) (since "the nude pictures [did] not show the plaintiffs engaging in any sexual conduct or performing any sexual activity," they were not "child pornography," notwithstanding their appearance in an "offensive" magazine like *Hustler*.)

Under the circumstances, a *reasonable* mistake as to the legality of the materials must be a defense. In *United States v. United States District Court for Central Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988), the Ninth Circuit held that the First Amendment requires that a defendant charged with violating 18 U.S.C. § 2251(a) be entitled to an affirmative defense based on a reasonable mistake of age. In *United States v. Gottesman*, *supra*, the Ninth Circuit held 18 U.S.C. § 2252 unconstitutional because the statute did not require proof of *scienter* that the materials distributed are child pornography. In *Gottesman*, the government argued that § 2252 required knowledge only of the "nature and character of the material":

> The government's position is a bit cagey; it suggests at times that the statute requires that the distributor know that the material is child pornography, but argues that it does not require that the distributor know the age of the performers.... What the government seems to be saying..., however, is that the statute does not even require that the defendant know that one or more performers was under the age of 18, so long as he knew the general nature of the materials he was distributing.

Id. 1992 WL 367097, *3.

The *Gottesman* court, which held § 2252 unconstitutional for failure to require knowledge that at least one of the persons depicted in the images in question was a minor, distinguished *United States District Court for the*

Central Dist. of Cal., *supra*, because producers are in a far different position from those who merely receive or transport visual images after they are fixed on film or videotape. Thus, while the Constitution merely requires the availability of an affirmative defense to producers charged under § 2251(a), the Ninth Circuit held that those charged under § 2252 cannot constitutionally be found guilty where they have not been charged with knowing that one of the persons depicted was under the age of 18.

In *United States v. Sherin*, 1987 WL 6146 (S.D.N.Y.), Judge Lowe, unlike the *Gottesman* court, judicially engrafted a *scienter* requirement onto 18 U.S.C. § 2252 to save it from unconstitutionality, but dismissed the indictment for failure to allege an essential element of the crime. These cases suggest that the Third Circuit's reliance on *Hamling v. United States*, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910, 41 L.Ed.2d 590 (1974); *United States v. Brown*, 862 F.2d 1033 (3d Cir. 1988); and *United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989) are inappropriate to the facts in *Knox*. Indeed, the Third Circuit's discussion of the rationale behind *Hamling*, *Brown*, and *Moncini* highlight the injustice of applying a similar *scienter* to Knox:

> To require proof that the defendant knew the materials were obscene and thus illegal to distribute, would allow defendants to avoid prosecution by claiming ignorance of the relevant law.... the child pornography laws would be eviscerated if a pedophile's personal opinion about the legality of sexually explicit videos was transformed into the applicable law.

United States v. Knox, *supra*, 977 F.2d at 825. (PA 22-23).

Hamling was obviously aware that he was dealing with materials depicting "sexually explicit conduct" of the type

that could be found to be obscene. Both Brown and Moncini knew they were dealing with materials depicting minors engaged in sexually explicit conduct. Brown merely believed that the material would depict adolescents under the age of 18, rather than pre-pubescents, while Moncini merely believed that mailing child pornography to the United States was not illegal. Knox possessed no such knowledge and was misled by the language of the statute, the legislative history, and the pattern of enforcement into believing that depictions of minors whose genitals were fully covered were not illegal. His good faith and objectively reasonable belief that these tapes did not violate the law prohibit his conviction.

C. If there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by clothing, then 18 U.S.C. § 2256(2)(E) is unconstitutionally vague and overbroad.

A statute which fails to provide adequate notice as to what conduct is prohibited is vague and cannot survive constitutional scrutiny. Moreover, if Congress is now held to have intended to include within the definition of § 2256(2)(E) depictions of fully clothed minors, then the law, as drafted, is facially invalid for overbreadth, because the arguably impermissible applications of the statute are real and "substantial." *See New York v. Ferber*, *supra*, 458 U.S. at 773, 102 S.Ct. at 3363.

Depictions of minors in which the genitals and pubic area are fully covered by clothing such as leotards, bathing suits, and underwear are undisputedly ubiquitous and can be found in newspapers, books, and magazines, clothing catalogs, family albums, on the walls of art museums, in movies and on television, at fashion shows, dance recitals, and gymnastics and swimming meets. It is

hardly comforting that "the limiting principle in the statute is the requirement of lasciviousness," the meaning of which the Third Circuit has described as "far from crystal clear." *United States v. Knox*, *supra*, 977 F.2d 823 fn. 5. (PA 19).

If an "exhibition of the genitals or pubic area" can be satisfied by fully clothed depictions of minors, the chilling effect of this law will be enormous. Anyone who has photographed a minor at a dance recital, swim or gymnastics meet, at the beach, or at home, will understand the danger of photographing a minor in a pose which could ultimately be deemed to be pornographic under federal law. Every photo will have to be examined to insure that the clothing covering the genitals and pubic area does not somehow end up as a "focal point" in the photograph, that the child doesn't look coy or appear to be striking an unnatural pose, or that the image doesn't contain any telltale signs of a "lascivious" intent. Parents will have to take care when photographing their children playing dress-up where the clothing will surely be "inappropriate" and where the children might strike "alluring" poses in childish playfulness, even though they are fully clothed. Any photographs of a clothed child taken in the proximity of a bed -- "a place associated with sexual activity" -- will be suspect. Another problem is that prosecuting authorities will have unlimited power to "get" an unpopular person, a political opponent, or a personal enemy because of the newly-established ease of making this dramatic criminal charge.

Such overbreadth cannot constitutionally be tolerated. When the Supreme Court upheld as constitutional the New York child pornography statute in *New York v. Ferber*, *supra*, it did so because the New York statute listed the prohibited sexual acts "with sufficient precision."

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.
>
> • • • •
>
> [The New York statute's] prohibition incorporates a definition of sexual conduct that comports with the above-stated principles .... The term "lewd exhibition of the genitals" is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation.

New York v. Ferber, 458 U.S. at 764-5, 102 S.Ct. at 3358-9.

The Supreme Court did *not* envision that the statute could be applied to depictions of clothed genitals and, in fact, warned:

> Nor will we assume that the New York courts will widen the possibly invalid reach of the statute *by giving an expansive construction* to the proscription on "lewd exhibition[s] of the genitals.

(emphasis added). *New York v. Ferber*, *supra*, 458 U.S. at 773, 102 S.Ct. at 3363.

A statute which on its face proscribes exhibitions only of "genitals or pubic areas" but which includes depictions

where those parts of the body are "fully covered" can hardly be said to be precise. A simple comparison of the wording of the federal statute with that of many state statutes which specify the type of covering required makes this obvious. The Third Circuit's decision in *Knox* clearly constitutes an expansive construction of the statute against which the Supreme Court warned.

Of course, as Justice White pointed out in *New York v. Ferber*, 458 U.S. at 769, 102 S.Ct. at 3361:

> When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. [citations omitted].

Rather than construe the statute narrowly, the Third Circuit chose to expand it, potentially criminalizing a "broad range of innocent conduct". Where, as here, there is no specific intent on the part of Congress that the statute "be so all-encompassing," such an interpretation should be rejected. *United States v. Yip*, 930 F.2d 142, 149 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 197, 116 L.Ed.2d 157. *See also*, *Liparota v. United States*, *supra*, 471 U.S. 419, 426, 105 S.Ct 2084, 2088, 85 L.Ed.2d 434 (1985). That Congress did not intend the statute to be so "all-encompassing" is obvious from the fact that it refrained from criminalizing even "lascivious" depictions of uncovered breasts or buttocks[6], and defined the term

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[6]For example, Connecticut Penal Code § 53a-193, prohibits depictions of the genitals, pubic area, or buttocks "with less than a fully opaque covering... or the depiction of the covered male genitals in a discernibly turgid state." *See also*, Hawaii Penal Code, § 8707-750; Kansas Criminal Code, Article 35, § 21-3516; Mass. Penal Code § 31; North Carolina Criminal Law, Article 26, § 14-190.13; Utah Criminal Code, Chapter 5a, § 76-5a-2; and Virginia Criminal Code, Article 6, § 18.2-390.

"lascivious exhibition of the genitals" in reference to the phrase "sexually explicit conduct," which is defined in 18 U.S.C. § 2256 also to include sexual intercourse, bestiality, masturbation, and sadistic and masochistic abuse. Although certain courts and prosecutors might wish to criminalize all depictions of minors which are "designed to sexually arouse a pedophile", we must heed Justice Brandeis' warning that

> [s]tatutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive.

United States v. Weitzel, 246 U.S. 533, 543, 38 S.Ct. 381, 383, 62 L.Ed. 872, 875 (1918).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Filed October 15, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-7089

UNITED STATES OF AMERICA

v.

STEPHEN A. KNOX,

Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Crim. No. 91-00074)

Argued August 17, 1992
BEFORE: HUTCHINSON, COWEN AND WEIS,
Circuit Judges

(Filed October 15, 1992)

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OPINION OF THE COURT

Cowen, *Circuit Judge*.

The principal question presented by this appeal is whether videotapes that focus on the genitalia and pubic area of minor females constitute an "exhibition of the genitals or pubic area" under the federal child pornography laws, 18 U.S.C. § 2252(a)(2), (4) (Supp. 1990); 18 U.S.C. § 2256(2)(E) (1988), even though these body parts are covered by clothing. We hold that such visual depictions qualify as an exhibition, and that this construction does not render the statute unconstitutionally overbroad. Finally, we conclude that the government presented sufficient evidence at the bench trial to establish both the necessary mens rea and the delivery of the films through interstate mail. We thus will affirm the conviction.

I.

In March of 1991, the U.S. Customs International Branch intercepted a mailing to France which contained a request that two videos, "Little Girl Bottoms (Underside)" and "Little Blondes" be sent to J. Richard Scott, 210 West Hamilton Avenue, No. 108, State College, PA. The parcel also contained a check drawn on the account of Stephen Knox and bearing his signature. The check listed his address as 210

East Hamilton Avenue, No. 25, State College, PA. A second envelope addressed to J. Richard Scott from the Netherlands also was confiscated and contained a catalog advertising for sale videotapes depicting nude, semi-clothed and clothed minors. Aware that Knox previously had been convicted of receiving child pornography through the mail, the customs investigators obtained a search warrant and with the assistance of the Pennsylvania State Police searched his apartment.[1]

The police officers seized three video cassettes produced by the Nather Company (hereafter "Nather Tapes"), a videotape distribution company based in Las Vegas, Nevada. A catalog from the Nather Company with checkmarks by several video selections was also removed from Knox's apartment. One of the marked videos in the brochure corresponded to a segment of a compilation tape which was seized. Envelopes addressed to Nather and Nather mail order forms were discovered as well as a carbon copy of a money order payable to Nather Company for an amount approximately equal to the price of a single video.

The tapes contained numerous vignettes of teenage and preteen females, between the ages of ten and seventeen, striking provocative poses for the camera. The children were obviously being directed by someone off-camera. All of the children wore bikini bathing suits, leotards, underwear or other abbreviated attire while they were being filmed. The government conceded that no child in

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1. The district court determined that the search of Knox's apartment did not violate the Fourth Amendment, and Knox does not contest this decision on appeal.

the films was nude, and that the genitalia and pubic areas of the young girls were always concealed by an abbreviated article of clothing. The photographer would zoom in on the children's pubic and genital area and display a close-up view for an extended period of time. Most of the videotapes were set to music. The films themselves and the promotional brochures distributed by Nather demonstrate that the video tapes clearly were designed to pander to pedophiles. *See infra* typescript at 5.

The United States prosecuted based exclusively on the three Nather tapes. Knox was indicted on two counts: (1) knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct and (2) knowingly possessing three or more videotapes that contain a visual depiction of a minor engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2) and (4). Sexually explicit conduct for both of these offenses is defined to include a "lascivious exhibition of the genitals or pubic area." 18 U.S.C. § 2256(2)(E).

Pursuant to Federal Rule of Criminal Procedure 12(b), Knox filed a pre-trial motion to dismiss the indictment contending that the videos did not contain an "exhibition" of the genitals or pubic area since these areas were always covered by underwear, a leotard or a bathing suit. Knox and the government agreed to a pre-trial hearing to determine whether the indictment was facially sufficient. The district judge viewed portions of the Nather tapes which the parties stipulated were representative of the material contained in the videos. To determine the meaning of the statutory language, "exhibition of the pubic area", the

district court looked to the plain meaning of the words. Since the pubic area is located directly adjacent to the genitalia, the district court concluded that other areas in close proximity to the genitals, specifically the "uppermost portion of the inner thigh", were also included in the statutory definition of the pubic area. *District Court Memorandum* at 14; App. at 41. Since the upper portion of the inner thigh was clearly exposed, the court held that the tapes contained an exhibition of the pubic area, and therefore denied Knox's motion to dismiss the indictment.

Knox waived his right to a jury trial and a bench trial was held. At the bench trial, all of the exhibits and testimony from the pre-trial hearing were incorporated into the record for purposes of the trial. Additionally, the government admitted into evidence advertising catalogs from Nather, Nather mail order forms, and envelopes addressed to the Nather Company which were seized from Knox's apartment. The catalogs described in detail the contents and intended effect of the films that could be purchased:

> 'Sassy Sylphs' will blow your mind so completely you'll be begging for mercy.
>
> Just look at what we have in this incredible tape: about 14 girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy. There are panties showing under shorts and under dresses and skirts; there are boobs galore and T-back (thong) bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better).

District Court Memorandum at 11; App. at 38.

The government also introduced evidence to establish that Nather mailed the tapes from its office in Nevada to the mailbox which Knox had rented under a fictitious name. Finally, the carbon copy of a sixty-two dollar money order payable to Nather was admitted to prove the method of payment. Although Knox did not testify and called no defense witnesses, he introduced magazine advertisements for Nather's videotapes which claimed that the absence of complete nudity rendered the tapes legal to purchase and possess.

The district court found Knox guilty on both counts. Thereafter, on February 13, 1992, Knox filed a motion for a judgment of acquittal or, alternatively, as he styled it, an application for a hearing to explore the anatomical issue decided by the court, predicated upon the contention that the uppermost portion of the inner thigh is not the pubic area. In conjunction with this motion, Knox submitted the affidavit of Dr. Todd Olsen, Director of Human Gross Anatomy at the Albert Einstein College of Medicine. The affidavit of Dr. Olsen stated that defining the pubic area to encompass the uppermost portion of the inner thigh is anatomically incorrect. Since the motion was filed three months after entry of the verdict, the district court denied the motion as untimely. Knox was sentenced to the minimum mandatory term of imprisonment of five years for each count, to be served concurrently. He appealed from the denial of the motion to dismiss the indictment, the guilty verdict, and the denial of the post-trial motion for judgment of acquittal.

II.

As a preliminary matter, we must resolve whether this Court has jurisdiction to review the denial of the post-trial motion for judgment of acquittal. Federal Rule of Criminal Procedure 29(c) provides: "If the jury returns a verdict of guilty . . ., a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." The time limit imposed on criminal defendants by Rule 29(c) may only be extended by court order, and a district court's refusal to consider a motion which is not made within the specified period is not error. *United States v. Wright-Baker*, 784 F.2d 161, 170 (3d Cir. 1986); *United States v. Heneshaw*, 687 F. Supp. 183, 185 (E.D. Pa.), *aff'd*, 862 F.2d 311 (3d Cir. 1988). The district court entered the verdict of guilty against Knox on November 15, 1991. Knox's counsel failed to move for a judgment of acquittal until February 13, 1992, far beyond the seven-day period mandated by Rule 29. Although the district court had the power to rule on Knox's belated motion, *see United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987), the exercise of that power was discretionary and the district judge chose to deny the motion as untimely. The district court clearly acted within its discretionary authority in refusing to reach the merits of a motion filed three months after the entry of the verdict. Knox seeks to appeal the substantive issues raised by his motion for judgment of acquittal. Since we conclude that the district court did not abuse its discretion in declining to entertain the motion, we need not

address the substance of that application. We now turn to the remaining rulings before us: the denial of the motion to dismiss the indictment and the entry of the guilty verdict.

III.

The Protection of Children Against Sexual Exploitation Act of 1977, as subsequently amended, criminalizes knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct and knowingly possessing three or more videotapes which contain a visual depiction of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2252(a)(2), (4). Sexually explicit conduct for purposes of both of these offenses is defined to include the "lascivious exhibition of the genitals or pubic area." 18 U.S.C. § 2256(2)(E). Holding that the indictment was facially sufficient, the district court reasoned that the statutory requirement that there be an exhibition of the pubic area was fulfilled since the uppermost portion of the inner thigh is part of the pubic area, and the upper thighs were clearly exposed. Because the meaning of the terms "pubic area" and "exhibition" under 18 U.S.C. § 2256(2)(E) poses a pure question of law, our review is plenary. *United States v. Brown*, 862 F.2d 1033, 1036 (3d Cir. 1988).

The district court's novel definition of the pubic area is anatomically and legally incorrect. The most widely accepted human anatomy treatises make clear that the pubic area is entirely above the genitals and not below or alongside that portion of the anatomy. H. Gray, *Gray's Anatomy*, 90-91 (30th ed. 1985); *Dorland's Illustrated Medical Dictionary*, 1533 (27th ed. 1988). The

uppermost portion of a female's thighs is not contained in the pubic area as the district court found. On its face, the statute criminalizes only exhibitions of the genitals or the pubic area. It does not prohibit depictions of body parts simply because they are located in close proximity to the genitals. Nor does the statute criminalize all visual images of children which an individual may find sexually arousing.

It is axiomatic that when the statutory language is clear, the words must be interpreted in accordance with their ordinary meaning. *Malloy v. Eichler*, 860 F.2d 1179, 1183 (3d Cir. 1988). Only the most extraordinary showing of contrary congressional intent may justify altering the plain meaning of a statute. *Id.* No evidence was presented that Congress intended to give the term "pubic area" a meaning more expansive than its standard medical definition. Even if the boundaries of the pubic area were uncertain, the rule of lenity mandates that ambiguity concerning the coverage of a criminal statute must be resolved in favor of the criminal defendant until Congress unequivocally states that the court has misconstrued its scope. *Crandon v. United States*, 494 U.S. 152, 168, 110 S.Ct. 997, 1006 (1990). The plain meaning of the statute coupled with the rule of lenity require the legal definition of "pubic area" to be confined to its medically accepted meaning. Displaying any portion of the inner thighs does not constitute an exhibition of the pubic area under 18 U.S.C. § 2256(2)(E).

IV.

Since the district court found that an exhibition existed from the exposure of the upper inner thigh,

it refused to decide whether the filming of the children's covered genitals and pubic area qualified as an exhibition. Having adopted the medical definition of the term "pubic area", we address the principal issue on appeal, the interpretation of an "exhibition." The government contends that the pictorial representation of the genitals or pubic area, covered only by underwear, a bikini bathing suit, a leotard or other abbreviated attire constitutes an exhibition of that body region. Defendant asserts that the genitals or pubic area must be unclad or nude, and fully exposed to the camera, before an exhibition may occur.

When interpreting a statute, the starting point is always the language of the statute itself. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537 (1982). Courts presume that Congress expressed its legislative intent through the ordinary meaning of the words it chose to use, *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 591 (1962), and if the statutory language is clear, it is not necessary to glean congressional intent through an examination of legislative history, *TVA v. Hill*, 437 U.S. 153, 184 n. 29, 98 S.Ct. 2279, 2296 n. 29 (1978); *Barnes v. Cohen*, 749 F.2d 1009, 1013 (3d Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S.Ct. 2126 (1985). An extraordinary showing of contrary congressional intent is necessary to justify altering the plain meaning of a statutory term. *Malloy*, 860 F.2d at 1183.

Knox attempts to read a nudity requirement into a statute which has none. The amended Protection of Children Against Sexual Exploitation Act criminalizes the "lascivious exhibition of the genitals or pubic area." 18 U.S.C. § 2256(2)(E)

(1988). Exhibit means "to present to view: show, display . . . to show publicly: put on display in order to attract notice to what is interesting or instructive." *District Court Memorandum* at 16 (quoting *Webster's New International Dictionary, Unabridged* (1976)). The genitals and pubic area of the young girls in the Nather tapes were certainly "on display" as the camera focused for prolonged time intervals on close-up views of these body parts. Additionally, the obvious purpose and inevitable effect of the videotape was to "attract notice" specifically to the genitalia and pubic area. Applying the plain meaning of the word "exhibition" leads to the conclusion that nudity is not a prerequisite for the occurrence of an exhibition.

Since the statutory language does not suggest that a nude exhibition is necessary, Knox bears the burden of demonstrating a clear contrary congressional intent to warrant importing into the statute an unexpressed requirement. *See Malloy*, 860 F.2d at 1183. An examination of the relevant legislative history, however, strengthens not undermines our construction of the statutory language. The legislative proposal before the original child pornography statute was enacted in 1977 would have proscribed "nudity, which nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." S. 1011, 95th Cong., 2nd Sess. (1977). Clearly, Congress understood how to limit the statute's scope to encompass only nude displays.

Since Congress considered including nudity as an element of a criminal depiction, the decision to eliminate this requirement must be deemed

intentional. When Congress passed the 1977 Act prohibiting a "lewd exhibition of the genitals or pubic area of any person", it must have desired to criminalize both clothed and unclothed visual images of a child's genitalia if they were lewd.[2] Appellant relies on a letter from the Justice Department outlining its views concerning S. 1001, the original proposed bill (containing the nudity language), as evidence that Congress assumed that an exhibition meant a nude exhibition. *Protection of Children Against Sexual Exploitation: Hearings before the Subcomm. to Investigate Juvenile Delinquency of the Comm. of the Judiciary*, 95th Cong., 1st Sess. 77-78 (1977), *reprinted in* 1978 U.S.C.C.A.N. 63 (letter from Patricia M. Wald, Assistant Attorney General to James O. Eastland, Chairman, Committee of the Judiciary). After suggesting that "lewd exhibition of the genitals" replace the proposed language, the Assistant Attorney General from the Justice Department stated "Congress could make clear in the legislative history of the bill what types of nude portrayals of children were intended to be encompassed within this definition." *Id.* The letter assumes that Congress only desired to prohibit nude exhibitions because at that time the language of the proposed bill included the word "nudity." By subsequently eliminating the word "nudity," Congress appears to have repudiated its earlier intention to confine the statute's coverage to nude

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2. A subsequent amendment, the Child Protection Act of 1984, replaced "lewd" with the word "lascivious", but the two words have identical meanings. *United States v. Wiegand*, 812 F.2d 1239, 1243 (9th Cir.), *cert. denied*, 484 U.S. 856, 108 S.Ct. 164 (1987).

exhibitions. Further, Congress failed to articulate anywhere in its extensive legislative history any desire that the statute, as enacted, prohibit only nude portrayals.[3]

The underlying rationale for the federal child pornography laws also supports the conclusion that clothed exhibitions of the genitalia are proscribed. When an obscenity statute is challenged as unconstitutional under the First Amendment, the Supreme Court balances the government's interest in protecting the sensibilities of unwilling recipients from exposure to pornography against the dangers of government censorship. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). Because the government interest, although legitimate, is not compelling, regulation of obscene materials is limited to works which "appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24, 93 S.Ct. at 2615.

The Supreme Court allows the states and Congress greater leeway to regulate and proscribe pornography that depicts minors as distinguished from adults since the harmful effects suffered by a child are palpably more severe. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348 (1982). The

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3. *See* H.R. Rep. No. 99-910, 99th Cong., 2nd Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952-59; S. Rep. No. 98-169, 98th Cong., 2nd Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 492; H.R. Rep. No. 98-536, 98th Cong., 2nd Sess. (1983); S. Rep. No. 95-438, 95th Cong., 2nd Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40-68; H.R. Rep. No. 95-696, 95th Cong., 2nd Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 69-71; H.R. Conf. Rep. 99-910, 99th Cong., 2nd Sess. (1977).

Court relaxes the *Miller* obscenity test when pornographic material portrays minors since the government's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." *Id.* at 756-57, 102 S.Ct. at 3354 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620 (1982)). The use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child. *Id.* at 757, 102 S.Ct. at 3355; *Osborne v. Ohio*, 495 U.S. 103, 109, 110 S.Ct. 1691, 1696 (1990). The psychological effect of visually recording the sexual exploitation of a child is devastating and its elimination of "surpassing importance." *Ferber*, 458 U.S. at 757, 102 S.Ct. at 3355. Since the child's image is permanently recorded, the pornography may haunt him or her for a lifetime because the child will be aware that the offensive photograph or film is circulating through the masses. *Id.* at 759 n. 10, 102 S.Ct. at 3355 n. 10 (quoting Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981)). The crime is the affront to the dignity and privacy of the child and the invasion of the child's vulnerability:

> Human dignity is offended by the pornographer. American law does not protect all human dignity; legally, an adult can consent to its diminishment. When a child is made the target of the pornographer-photographer, the statute will not suffer the insult to the human spirit, that the child should be treated as a thing.

U.S. v. Wiegand, 812 F.2d 1239, 1245 (9th Cir.), *cert. denied*, 484 U.S. 856, 108 S.Ct. 164 (1987).

Additionally, controlling the production and dissemination of child pornography is of paramount importance since pedophiles often use child pornography to seduce other children into performing sexual acts. *Osborne*, 495 U.S. at 111, 110 S.Ct. at 1697.

To vindicate the compelling government interest in protecting the safety and welfare of children, not only is the spectrum of constitutionally unprotected pornographic material broader when the subjects are children rather than adults, but also the arsenal of available enforcement mechanisms is more extensive. For instance, the mere possession of child pornography, even in one's home, may be criminalized although only distribution of obscenity depicting adults can be proscribed. *Compare Stanley v. Georgia*, 394 U.S. 557, 568, 89 S.Ct. 1243, 1249 (1969) (Georgia statute outlawing private possession of obscenity violates the First Amendment) *with Osborne*, 495 U.S. at 108, 110 S.Ct. at 1695-97 (Ohio statute criminalizing possession of child pornography upheld against First Amendment challenge due to the compelling interest in protecting minors).

The harm Congress attempted to eradicate by enacting the child pornography laws is present when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles. The child is treated as a sexual object and the permanent record of this embarrassing and humiliating experience produces the same detrimental effects to the mental health of the child as a nude portrayal. The rationale underlying the statute's proscription applies equally to *any*

lascivious exhibition of the genitals or pubic area whether these areas are clad or completely exposed.

Knox next asserts that our decision in *U.S. v. Villard*, 885 F.2d 117 (3d Cir. 1989), mandates that the genitals or pubic area be exposed before an exhibition may occur. In *Villard*, we stated that "more than merely nudity" was required for a violation of the statute; otherwise, "inclusion of the term 'lascivious' would be meaningless." *Id.* at 121. The requirement of more than mere nudity does not mean, as Knox contends, that nudity is a prerequisite to the existence of an exhibition; rather *Villard* simply stated the obvious principle that nudity alone is insufficient to constitute a *lascivious* exhibition. No one seriously could think that a Renoir painting of a nude woman or a family snapshot of a naked child in the bathtub violates the child pornography laws. Nudity must be coupled with other circumstances that make the visual depiction lascivious or sexually provocative in order to fall within the parameters of the statute. Such was our holding in *Villard*, which addressed whether sufficient evidence existed to justify a finding of lasciviousness.

Villard is not only consistent with our interpretation of an exhibition, but supports this construction. The *Villard* Court outlined six factors which should be analyzed to determine whether an exhibition is lascivious:

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

4) *whether the child is fully or partially clothed, or nude*;

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. at 122 (emphasis added) (quoting *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom., United States v. Wiegand*, *supra*. The analysis is qualitative and no single factor is dispositive. *Id.* The inclusion of the fourth factor rests on the implicit assumption that a clothed exhibition of the genitals is criminalized under the statute. Since whether a child is fully clothed, partially clothed or naked is one of several factors to be weighed to determine whether an exhibition is lascivious, it follows that an exhibition may occur when a child is fully or partially clothed.

Having analyzed the language of the statute, its legislative history, the underlying rationale for the federal child pornography laws and relevant case law, we conclude that nude exposure of the genitals or pubic area is not necessary for an exhibition to take place.

V.

Interpreting an "exhibition" of the genitals or pubic area to include a clothed display of these areas does not render the statute

unconstitutionally overbroad.[4] The function of the First Amendment overbreadth doctrine is to prevent broadly worded statutes which control constitutionally unprotected conduct from deterring constitutionally protected expression. Invalidating a statute as overbroad, however, is an exceptional remedy and should be employed sparingly and only as a last resort since it is "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916 (1973). Before a child pornography statute is declared unconstitutional, the overbreadth must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S.Ct. at 2918. The requirement of substantial overbreadth is equally applicable to challenges that arise in defense of a criminal prosecution. *Ferber*, 458 U.S. at 772-74, 102 S.Ct. at 3363. In *Ferber*, the Supreme Court held that the New York statute which criminalized the "lewd exhibition of the genitals" was not constitutionally overbroad. *Id.* Although some protected expression, ranging from medical textbooks to National Geographic photographs, could possibly be reached by the statute, this tiny fraction of materials within the statute's coverage could be protected by case-by-case analysis. *Id.*

Knox's prediction that our interpretation of an exhibition will result in prosecutors leafing through family albums and church bulletins containing innocent pictures of fully clothed children and pressing charges is unfounded.

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4. The term "pubic area" cannot be challenged as vague or overbroad since Knox contends, and we agree, that this phrase describes a precise anatomical region.

Although our interpretation of an exhibition is expansive, the limiting principle in the statute is the requirement of lasciviousness.[5] A visual depiction of a child, whether the child is clothed or naked, must be lascivious to be proscribed. Whether a depiction is lascivious is essentially a subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer. *Villard*, 885 F.2d at 122. Only a minuscule fraction of all pictures of minor children will be sufficiently sexually suggestive and unnaturally focused on the genitalia to qualify as lascivious. Even fewer images where a minor's genital area is not fully exposed will constitute a lascivious exhibition since the fact that a child's genital area is covered is a factor militating against a finding of lasciviousness. Thus, including scantily clothed displays of the genitals within the meaning of an exhibition leaves the statute "directed at the hard core of child pornography," *Ferber*, 458 U.S. at 773, 102 S.Ct. at 3363, which results in leaving an indelible psychological scar on the exploited child. Our interpretation simply declines to create an absolute immunity for pornographers who pander to pedophiles by using as their subjects children whose genital areas are barely covered.

VI.

Knox contends that insufficient evidence was presented at trial for a trier of fact to have found,

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5. The issue is not raised in this case, but we note that although the meaning of lasciviousness is far from crystal clear, it is not unconstitutionally vague or overbroad. *See United States v. O'Malley*, 854 F.2d 1085, 1086-87 (8th Cir. 1988); *Wiegand*, 812 F.2d at 1243.

beyond a reasonable doubt, that (1) the Nather tapes traveled through the mail in interstate commerce; and (2) Knox "knowingly" received child pornography through the mail and "knowingly" possessed three pornographic videotapes. Generally, this Court must examine the evidence as a whole in the light most favorable to the government, and must sustain a conviction if there is substantial evidence to support it. *United States v. Lowell*, 649 F.2d 950, 958 (3d Cir. 1981). If a defendant fails to file a timely motion for judgment of acquittal, however, we must review the sufficiency of the evidence only for plain error. *Wright-Barker*, 784 F.2d at 170 (citing *United States v. Manos*, 340 F.2d 534, 537 (3d Cir. 1976)). Since Knox's motion for judgment of acquittal was untimely (*see* discussion *supra* section II), we must determine if the district court committed plain error in reaching its challenged findings. At least one court of appeals has held that this semantic distinction does not alter the analysis because the plain error test and the sufficiency of the evidence standard are essentially equivalent inquiries. *See United States v. Bowie*, 892 F.2d 1494, 1497 (10th Cir. 1990) (although the plain error rule was applicable "the standard actually applied is essentially the same as if there had been a timely motion for acquittal"); 2 Steven A. Childress, *Federal Standards of Review* § 9.12 (2d ed. 1992). We need not determine the precise boundaries of the plain error test since the government fulfilled the more stringent standard - there was sufficient evidence to support the district court's finding that the Nather tapes traveled though the mail and that Knox knowingly received and possessed those films.

To establish interstate mailing, the government introduced evidence that Knox rented a mailbox under a fictitious name and that he received other pornographic materials at that mailbox. When agents searched Knox's apartment pursuant to a valid search warrant, they discovered advertisements from Nather with checkmarks by several video tapes and envelopes, pre-addressed to Nather, with forms to order Nather tapes. One of the videos marked in the catalog was included as a segment of a compilation tape found in Knox's apartment. A carbon copy of a $62 money order payable to Nather was also seized from Knox's apartment. Sixty-two dollars is the approximate price of a single Nather tape. Knox is correct that the government never introduced direct evidence that Nather mailed tapes to Knox's rented mailbox. A trier of fact, however, may consider direct and circumstantial evidence and the reasonable inferences to be drawn therefrom. The above facts provide strong circumstantial support that Nather, a Nevada mail order video company without any offices in Pennsylvania, at some point utilized the postal system to cause the tapes it distributes to be discovered in Knox's apartment in Pennsylvania. We cannot say that it was plain error to ~~conclude that the~~ Nather tapes traveled ~~through the mail~~.

The district court also did not commit plain error by finding that Knox "knowingly" received and possessed the Nather tapes. Knox maintains that the absence of nudity in the films and the disclaimers in the Nather brochures that the videos were legal to purchase and own disproves the mens rea element of section 2252. We have previously held that the mens rea requirement of

section 2252 "does not require that a recipient of child pornography know the precise contents of such materials." *United States v. Brown*, 862 F.2d 1033, 1036 (3d Cir. 1988). In *Brown*, the defendant ordered one film, but accidentally received a different tape. Since the defendant knew the video he requested was child pornography, we deemed it irrelevant that he did not know the exact contents of the substituted tape actually mailed to him.

Knox's argument in this case is somewhat different. He claims that although he knew the contents of the Nather tapes, he was unaware that the videos were child pornography and believed they were legal to own. To address this contention, we look to the Supreme Court's interpretation of a strikingly similar statute for guidance. To fulfill the "knowingly" requirement of 18 U.S.C. § 1461 (the obscenity law concerning adults)[6], the Supreme Court held that the prosecution need only show that the defendant had knowledge of the contents, character and nature of the materials. *Hamling v. United States*, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910 (1974). To require proof that the defendant knew the materials were obscene, and thus illegal to distribute, would allow defendants to avoid prosecution by claiming ignorance of the relevant law. *Id.* It would be ironic to construe the same word, knowingly, in the analogous child pornography law as more lenient to criminal defendants since the purpose for

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6. Title 18 U.S.C. § 1461 (1988) provides in pertinent part: "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable . . . shall be fined. . . ."

enacting the child pornography statute was to create more stringent regulation for child pornography than already existed through the generally applicable obscenity laws. Therefore, to fulfill the knowledge element of section 2252, a defendant simply must be aware of the general nature and character of the material and need not know that the portrayals are illegal. *See United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989) (no need to prove knowledge of illegality under section 2252); *United States v. Tolczeki*, 614 F.Supp. 1424, 1429 (N.D. Ohio 1985) (same).[7] The child pornography laws would be eviscerated if a pedophile's personal opinion about the legality of sexually explicit videos was transformed into the applicable law.

There is no doubt that Knox was aware of the nature of the Nather tapes when he received them. Newsletters from Nather found in Knox's apartment described the contents of the films, "girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy . . . so revealing it's almost like seeing them naked", and the video's intended effects, "Sassy Sylphs will blow your mind so completely you'll be begging for mercy." Knox handwrote his own descriptions of the Nather films on the outside of the boxes. For instance, on the Nather II tape, Knox wrote

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7. Since it was not raised, we reserve for another day the issue of whether a defendant must know that the subjects of the photograph or film are minors. Although section 2252 does not require that the defendant know the age of the minor, some courts have held that the First Amendment dictates that defendants be entitled to establish reasonable mistake of age as an affirmative defense. *See United States v. United States Dist. Court for Cent. Dist of Cal.*, 858 F.2d 534 (9th Cir. 1988).

"13-year old flashes" followed by "hot." Knox characterizes the second vignette as "15 year old shows nipple." Both Nather's and Knox's descriptions of the tapes clearly demonstrate that Knox was aware that the videotapes contained sexually oriented materials designed to sexually arouse a pedophile. Sufficient evidence was presented at the bench trial to support a finding that Knox was aware of the nature of the Nather tapes, and therefore knowingly possessed and received them.

Even if a reasonable mistake as to the legality of the material was recognized as a defense, the language of the statute is clear that nudity is not a prerequisite for a lascivious exhibition. Additionally, relying on Nather's disclaimer is tantamount to asking a hard core pornographer for legal advice as to whether the material he earns a living by selling is legal. Nather's disclaimer could not reasonably lead Knox to believe that the videotapes were legal. If anything, the need to profess legality should have alerted Knox to the films' dubious legality.

VII.

In sum, we hold that an "exhibition of the genitals or pubic area" pursuant to 18 U.S.C. § 2256(2)(E) encompasses visual depictions of a child's genitals or pubic area even when these areas are covered by an article of clothing. Our construction of the statutory language does not render the statute unconstitutionally overbroad since the requirement of lasciviousness limits the proscribed depictions to constitutionally unprotected expression. Finally, the district court did not commit plain error when it determined that

the prosecution presented sufficient evidence to establish beyond a reasonable doubt that Knox knowingly received and possessed the videotapes and that the films traveled through interstate mail. The judgment of conviction will therefore be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit